



**Emris Investment Limited v Jirongo & 2 others; Nairobi City County & another (Garnishee)
(Environment & Land Case 932 of 2013) [2022] KEELC 3783 (KLR) (21 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3783 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 932 OF 2013**

**LN MBUGUA, J
JULY 21, 2022**

BETWEEN

EMRIS INVESTMENT LIMITED DECREE HOLDER

AND

CYRUS SHAKALAGHA KWA JIRONGO 1ST JUDGMENT DEBTOR

CYPER ENTERPRISES LIMITED 2ND JUDGMENT DEBTOR

OFF-SHORE TRADING COMPANY 3RD JUDGMENT DEBTOR

AND

NAIROBI CITY COUNTY GARNISHEE

KUZA FARMS & ALLIED LIMITED GARNISHEE

RULING

1. The background of this dispute is that the Plaintiff/Decree holder instituted this suit by way of a plaint filed on July 17, 2013, claiming inter-alia a sum of Kshs 32,000,000 from the Defendants (now Judgment Debtors) jointly and severally in relation to a land deal gone sour.
2. The Judgment Debtors did not file their pleadings in time culminating in entry of a default judgment on August 15, 2013 and thereafter costs were confirmed on November 1, 2013 to the tune of Ksh.561485/=. The Judgment Debtors had moved the court via an application dated 8.11.2013 seeking orders to set aside the aforementioned judgment. *Vide* a ruling delivered on February 6, 2015, the application was dismissed paving way for execution proceedings.
3. The Defendants again moved the court *vide* an application dated 9.12.2015 seeking extension of time to lodge an appeal against the ruling of 6.2.2015. The said application was however settled in terms of



a consent recorded in court on December 15, 2015, in which the Judgment Debtors offered to pay the sums due to the Plaintiff in installments including interests and costs.

4. The Judgment Debtors defaulted in satisfying the consent of 15.12.2015 leading to further execution proceedings by way of warrants of attachment of movable properties in which as at the time of filing the application, the amounts owed to the Decree holder by the Judgment Debtors stood at Ksh.42,429,742. Apparently the attachment procedures yielded naught, giving rise to these garnishee proceedings which form the subject matter of this ruling.

The Application dated 21.11.2016

5. The Decree Holder filed the above application on November 22, 2016 seeking the following orders:
 1. That the application herein be certified as urgent and service hereof be dispensed with in the first instance.
 2. That the honourable court be pleased to issue an order of Garnishee *Nisi* against the Garnishees attaching the decretal sum of Kenya Shillings Forty Two Million, Four hundred and Twenty Nine Thousand, Seven Hundred and Forty Two Shillings (Kshs.42,429,742) pending the hearing and determination of this application.
 3. That the said garnishees should attend court before the honourable judge in chambers on.....day of.....2016 at 9.00 o'clock in the forenoon to show cause why the said garnishee should not pay the said decree holder the debt due from the said garnishee in full satisfaction of the judgment debt, cost and accrued interest including cost of these garnishee proceedings.
 4. That all sums (or so much thereafter as may be sufficient to satisfy the undermentioned judgment debt) due from Nairobi City County (hereinafter called "the garnishee") in the name of kuza Farm & Allied be attached to answer the judgment obtained in the above case against the Judgment Debtor on the 16th day of August 2013 for the outstanding sum of Kenya Shillings Forty Two Million Four Hundred and Twenty Nine Thousand Seven Hundred and Forty Two Shillings (Kshs.42,429,742) only, Kenya Shillings Eleven Million, Eight Hundred and Sixty Eight Thousand and Two Hundred and Thirty Two (11,868,232) being interest and Kenya Shillings Five Hundred and sixty one Thousand, Four Hundred and Eighty Five Shillings (KShs.561,485) only as costs of the suit.
6. The above application was allowed in terms of prayer no.2 (Garnishee *Nisi* order) on December 2, 2016.
7. On July 27, 2017, 7 months into the lifespan of the subject application, only the 1st Garnishee had allegedly filed a Replying Affidavit to the application. On the aforementioned dated, the court gave directions that the responses to the application be filed and served within 7 days and the application was to be heard by way of written submissions. A perusal of the record reveals that the Applicant filed their submissions on 6.3.2018, the Judgment Debtors filed grounds of opposition on March 16, 2018 and their submissions are dated June 21, 2021. The 1st Garnishee filed a preliminary objection dated April 24, 2018 and their submissions were filed on May 7, 2021. I have not come across any response or submissions emanating from the 2nd garnishee.

Case for the Applicant

8. The case for the Decree Holder is anchored on the grounds set out on the face of the application and in the supporting affidavit and the supplementary affidavit of Mutembei Marete, advocate for the Decree



Holder filed on November 22, 2016 and on February 21, 2018 respectively. I have stumbled upon another supplementary affidavit sworn by the same advocate for the Decree Holder filed on June 13, 2018 in which in paragraph 2 thereof, it is stated that “I have read the contents of the 2nd Garnishee’s Replying Affidavit sworn on their behalf by Ann Lanoi Perted and I wish to respond as follows”. There is no mention as to whether the said Replying affidavit of the 2nd Garnishee was filed in court, none is in the court file and the 2nd Garnishee has never brought to the attention of the court that they ever filed any response. In that regard, the court disregards the contents of the aforementioned supplementary affidavit, since it seeks to respond to an unknown Replying Affidavit.

9. The case for the Applicant is that vide a decree of this court, the Judgment Debtor owe the Decree Holder a principle sum of Kshs. 32,000,000 plus costs and interest which stood at 42,429,742 at the time of lodging the application. That the Judgment Debtor’s only paid Kshs. 2,000,000. That vide a letter dated December 4, 2015, the Judgment Debtors forwarded five cheques to Decree Holder’s advocates as part-payment of the decretal sums. That the cheques were drawn in the name of the 2nd Garnishee i.e Kuza Farms and Allied Limited and were signed by the 1st Defendant/Judgment Debtor who is a director and majority shareholder of the 2nd Garnishee. The cheques were presented for payment but were returned un-paid due to insufficient funds.
10. The advocates for the Decree Holder proceeded to engage the firm of Moran Auctioneers and Keysian Auctioneers to try and realize the decretal sums through the attachment of moveable and immoveable properties of the Judgement Debtors but this was not fruitful.
11. The Applicant contends that the 1st Garnishee (the Nairobi City County Government) owes the 2nd Garnishee a sum of Kshs. 250,000,000 pursuant to a consent entered in the case ELC. Petition No. 507 of 2014 (Kuza Farms and Allied Limited v Nairobi City County and others). That by a letter dated September 9, 2016, the Judgment Debtors’ advocate gave an undertaking to pay a sum of Kshs 18,000,000 to the Advocates of the Decree holder from the proceeds of the aforementioned case ELC. PET. No.507 of 2014. Thus the 2nd Garnishee has made attempts to settle the decretal amount and in any event, they have not responded to the current application.
12. The Applicant avers that the 1st Defendant/Judgment Debtor is the sole controlling and/or majority shareholder of the 2nd garnishee and is the sole decision maker, thus the 1st Defendant is synonymous with the 2nd garnishee as well the 2nd and 3rd Defendants.
13. To this end, the applicant terms the relationship between the 1st Judgment Debtor and the 2nd garnishee as symbiotic and Siamese hence there can be no one of them without the other.
14. The Applicant further states that the garnishee orders are the only window of opportunity left and open to the Decree Holder to realize the outstanding decretal sums, considering that the 1st Judgment Debtor has been declared bankrupt.
15. Against this background, the applicant prays that the orders sought be given so that he is not deprived of the fruits of his decree.

The case for Judgment Debtors

16. The Judgment debtors opposed the application vide grounds of opposition filed on March 16, 2018. Therein they state that:
 1. The said application does not disclose any cause of action under the provisions of Order 23(1) (2) and (3).
 2. The Judgment Debtors are not owed any money by the alleged Garnishees.



3. It is trite law that a company is a distinct and separate personality from its shareholders.
4. It is trite law that the property of a company is distinct and separate and cannot in law be treated to be that of its shareholders.
5. The application is based on wrong and false factual premises.
6. The application is misconceived in law and should be dismissed with costs.

Case for the 1st Garnishee

17. The 1st Garnishee opposed the application by way of a Replying Affidavit sworn on November 29, 2016 by one Robert Ayusi in his capacity as the County Secretary of the 1st Garnishee. They contend that the Application has no legal issues against them and that the application was brought prematurely. Citing the provisions of Order 23 rule (1) of the *Civil Procedure Rules*, the 1st Garnishee avers that the debt to be settled ought to be between the Garnishee and the Judgment Debtor.
18. However, in the current dispute, there is no Garnishee- Debtor relationship. This is because the debt in question, of which settlement was confirmed by a court order in ELC 507 of 2014 *Kuza Farm Limited v Nairobi City County & Others* is between the two Garnishees, and that the 1st Garnishee does not owe any monies to the Judgment Debtors herein.
19. The 1st Garnishee further contends that they have every intention to make good their debt to the 2nd Garnishee as set out in the aforementioned case ELC 507 OF 2014. They however aver that the payments were conditional upon the 2nd Garnishee executing all requisite transfer documents to facilitate the registration of the land in question in favour of the 1st Garnishee. That the aforementioned conditions have so far not been met rendering it impossible for the 1st Garnishee to pay the debt to the 2nd Garnishee. In that regard, the Decree Holder herein cannot hold it against the 1st Garnishee for frustrating the compensation in adherence to the court order as the same has been rendered impossible by the laxity on the part of the 2nd Garnishee in the performance of their part as stipulated in the court order.
20. The 1st Garnishee also states that the allegation made by the Applicant that the 1st Judgment Debtor is synonymous with the 2nd Garnishee is not true. They aver that the 2nd Garnishee being a company is a distinct legal entity, thus entitled to a legal personality of its own, separate from its directors and shareholders, who in this case constitute the 1st Judgment Debtor. However, in accordance with the *Companies Act*, he is considered as a mere member of the company and his liability towards the company is limited in scope as the two are separate entities.
21. Still in opposition to the application of the Decree holder, the 1st Garnishee did file a Preliminary Objection on April 24, 2018 where the following grounds have been raised:
 1. The application filed herein is not tenable in law against the 1st Garnishee by virtue of Section 21(4) of the *Government Proceedings Act* and Order 29 Rule 2(1)(a), (2) and 4(1) of the Civil Procedure Rules which expressly prevent enforcement of debt against the Government and as a result applies to the 1st Garnishee herein.
 2. An application under Order 23 of the *Civil Procedure Rules* was not sustainable in law against the property of Government at any level. The County Government of Nairobi herein is a level of Government.



3. The court cannot order that the funds of the Government, which are in the hands of any Garnishee, be attached.
4. The application as filed is not sustainable in law.

The case for 2nd Garnishee

22. The 2nd Garnishee did not file any responses and or submissions to the current application.

Submissions of the Applicant

23. The applicant raised four issues for determination, that is;

Whether the parties before the court are proper under the *Civil Procedure Rules*, Whether the corporate veil of the 2nd Garnishee should be lifted, the conduct of the 1st judgment debtor vis-a-vis the corporate veil and the Organic theory of the Companies.

24. It was submitted that Section 34 of the *Civil Procedure Act* gives jurisdiction to this court to determine all questions relating to the execution, discharge or satisfaction of a decree.
25. It was also submitted that the 2nd garnishee is an appendage of the 1st Defendant since the later had singularly and solely drawn and signed cheques in the name of the 2nd Garnishee company. Moreover, neither the 1st Judgment Debtor nor the 2nd garnishee have denied the fact of operating and conducting business as one and the same person. The Applicant submits that it is the 1st garnishee who has raised the argument that the 1st Judgment Debtor and 2nd garnishee are separate entities, but this is a party (read 1st Garnishee) who owes the 2nd Garnishee some monies, hence their interest should only be in settling the decretal amount and not giving directives on whom the decretal amount should be paid to.
26. In that regard, the Applicant avers that the parties before this court are proper since the Decree-Holder has established and shown that the 1st Judgment Debtor and the 2nd Garnishee are one and the same person.
27. On the issue of lifting the corporate veil, the court was urged to treat the 2nd Garnishee and 1st Judgment Debtor as one person for the purposes of executing the decree herein. That the Judgment Debtors in this case, had conspired to maneuver and run away from executing a decree by purporting to substitute the attached property with property owned by their own company. Thus the court should lift the corporate veil and attach the properties of the Judgment Debtors.
28. The case law relied upon by the Applicants is; *Arun C. Sharma v Ashana Raikundalla & 5 Others* (2015) eKLR, *Roseline Awino Okwach and another v Pan Africa Insurance Company and 2 others* (2016)eKLR, as well as *Halsbury's laws of England 4th Edition*.
29. On the question of organic theory of Companies, it was submitted that in practice and for certain purposes, courts have elected to treat certain officers of a company as acts of the Company itself in what came to be known as the organic theory of Companies. That this theory was enunciated in *Bolton Engineering Co. v Graham* where Denning L.J. stated as follows:

“A company may in many ways be likened to a human being, it has a brain and a nerve center which controls what it does, it also has hands which hold all the tools and acts in accordance with the directions of the center....”



30. Reference was also made to the case of *Lennard's Carrying Company v. Asiatic Petroleum Co. Ltd* to buttress the point that a company is an abstraction with no mind of its own and its active and directive will must consequently be sought in the person of somebody who is really the directive mind and will of that company.
31. The Applicant therefore contends that it is presumed that the 1st Judgment Debtor acted within the scope of his authority in signing and issuing cheques which were in the name of the 2nd Garnishee and he was therefore the sole controlling mind of the 2nd Garnishee Company and his actions render his Company liable in both civil and criminal law. Adding that the 1st Judgment Debtor in addition to refusing to pay the subject debt, had also issued bouncing cheques. In that regard, the court should treat the acts of the Judgment Debtors as those of the 2nd Garnishee by applying the organic theory of companies.
32. Finally, the court was urged to note that the failure by the Judgment Debtors and 2nd Garnishee to file responses in this matter is an admission of liability. To this end, the Applicant prays that the application dated November 21, 2016 be allowed with costs.

Submissions of the 1st Garnishee

33. For the 1st Garnishee, their submissions are dated May 4, 2021. They aver that they are a Government in terms of Section 21(4) of the *Government Proceedings Act*, hence the proceedings against the 1st Garnishee are not merited.
34. The 1st Garnishee relied on the case of *County Government of Uasin Gishu v Abbey Resort Ltd: Kenya Commercial Bank and 2 Others (Garnishees)* (2020) where the court held that:

“It is trite and a statutory imperative under Section 21(4) of the *Government Proceedings Act* that no execution or attachment process may be issued for enforcement of payments by the Government of any money, or costs save by leave of the Court, and upon obtaining a certificate of order against such government, including a County government as recognized under Article 189 of the *Constitution*”.

Other cases proffered by the 1st Garnishee on this point are; *Cecilio Murango Mwenda t/a as Murango Mwenda & Co. Advocates v Isiolo County Government & Another* (2017) eKLR and *Kilimanjaro Safari Club Limited v Governor Kajiado County* (2014) eKLR.

35. The 1st Garnishee further submitted that the proceedings before the court do not satisfy the ingredients for Garnishee orders, arguing that there is no Debtor-Creditor relationship that exists between the Decree Holder and 2nd Garnishee that would create any susceptibility to execution on the part of the 1st Garnishee. It was further argued that the Applicant had made a wrong assumption of law that the 1st Judgment Debtor is the controlling director of the 2nd Garnishee.
36. The 1st Garnishee avers that the Decree Holder does not understand the principals of lifting the corporate veil and organic theory of companies. That there is nothing to show that the 1st Judgment Debtor is a director/shareholder or beneficial owner of the 2nd Garnishee, there is no established nexus between the Decree Holder and the 2nd Garnishee, save for the cheques allegedly issued in 2nd Garnishee's name, in assistance/loan to the 1st Judgment Debtor at a time it was in distress. That the cited English cases do not say that a company can be the mind of a Director/Shareholder, as it's the other way round, thus while Director/Shareholders may be liable for acts of the company, the revers would not be true, unless; it is demonstrated that Director/Shareholder and/or employee acted on behalf of the company as an agent and, by resolutions of the 2nd Garnishee, it agreed to step in the



shoe of a guarantor for liabilities incurred by the 1st Judgment Debtor on an identifiable transaction. The 1st Garnishee therefore contends that the cases of *Bolton Engineering Co. v Graham Lennard's and Lennard's Carrying Company v. Asiatic Petroleum Co. Ltd* cited by the Decree Holder while being good law do not apply in the circumstances of this case.

37. The cases proffered by the 1st Garnishee in support of their above mentioned arguments are; [Ngaywa Ngigi & Kibet Advocates v Invesco Insurance company Ltd.; Diamond Trust Bank \(Garnishee\)](#) (2020) eKLR, *Salmon v Salmon & Company Limited* 1897 A.C and *Ultimate Laboratories, v Tasha Bio Service Ltd.* Nairobi HCCC. No. 1287 of 2000.
38. Finally, it was submitted that there is no amount of money held nor due to the 2nd Garnishee from the 1st Garnishee, that the parcel of land in question has not been transferred to the 1st Garnishee, thus there is no payment to 2nd Garnishee from 1st Garnishee and that there is no debt which is owing to the Decree Holder from the 2nd Garnishee.
39. In that regard, the 1st Garnishee prays for the dismissal of the application with costs.

Submissions of the Judgment Debtors

40. The submissions of the Judgment debtors are dated June 21, 2021 where it is averred that the application of the Decree Holder is based on untrue averments. The Judgment Debtors contend that the directors of the 3rd Judgment Debtor are Swift Distributors Limited and Home Décor Limited and not the 1st Judgment Debtor. They also aver that it is not true as alleged by the Decree Holder that the Judgment Debtors have no property, since the 2nd Judgment Debtor owns a parcel of land L.R. NO.12979/3. It is further argued that the Applicant has not produced any evidence of the alleged relationship between the 1st Judgment Debtor and 2nd Garnishee who in any event are distinct and separate legal persons and that there are no grounds advanced by the Decree Holder to merit the lifting of the corporate veil. Thus the garnishee proceedings are irregular and should be dismissed.

Determination

41. I have considered the application dated November 21, 2016, the responses thereto including the notice of preliminary objection dated 24.11.2018 brought forth by the 1st Garnishee, the parties respective submissions and the relevant legal framework and jurisprudence appertaining to the disposal of the matter at hand. There is no controversy that the Judgment Debtors owe the Decree Holder the sums mentioned in the current application. It is also not disputed that there exists a case ELC PET. 507 of 2014 between the two Garnishees in which a consent was recorded on July 28, 2015 where the 1st Garnishee was to pay to the 2nd Garnishee monies amounting to Ksh. 250,000,000.
42. The gravamen of the dispute is whether the Garnishee orders can be issued against the 1st Garnishee, the same being a Government on one hand and whether such an order can be made against the 2nd Garnishee which is a company, keeping in mind that the targeted funds are the proceeds from ELC. Pet. No. 507 of 2014.
43. At this point, it is pertinent to note that the Garnishee *Nisi* order (prayer No. 2) in the application of November 21, 2016 was allowed on 2.12.2016. The application has had a chequered history where at some point in its lifespan, it was dismissed but was finally reinstated along with the orders given earlier on.
44. The Applicant contends that the amount outstanding is Kshs 42,429,742 (as at the time of filing the application). It further states that the 1st Garnishee is about to release the sums owed to 2nd Garnishee



pursuant to the consent recorded in Nairobi Petition ELC. No. 507 of 2014. The said consent was availed as annexure “H” by the Decree holder.

Whether the 1st Garnishee is liable to pay decretal sums

45. The 1st Garnishee vide its preliminary objection dated April 24, 2018 contends that the Garnishee proceedings cannot apply to them as they are a Government within the meaning of Section 21(4) of the *Government Proceedings Act*. The same provides that:

“Save as provided in this Section, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any money or costs, and no person shall be individually liable under any order for the payment by the Government or any Government department, or any officer of the Government as such, of any money or costs.”

46. Order 29 Rule 2 of the *Civil Procedure Rules* provide that:

“Except as provided by the *Government Proceedings Act* or by these rules.....

- a. No order against the Government may be made underOrder 23 (Attachment of debts)”.

47. The jurisprudence on whether a County Government can be subjected to Garnishee proceedings is in abundance and is also settled; See; *Keneddy Wainaina Ng’ang’a v County Government of Nairobi: Co-operative Bank of Kenya Limited (Garnishee)* 2018 eKLR, *Kilimanjaro Safari Club Ltd v Governor Kajiado County* (2014)eKLR.

48. The net result of the above analysis is that the Garnishee proceedings cannot be sustained as against the 1st Garnishee who is a Government.

Whether the 2nd Garnishee is liable to pay decretal sums

49. It is trite law that the object of Garnishee Proceedings is to enable a Decree Holder to reach a debt due to the Judgment Debtor from the Garnishee as may be sufficient to satisfy a Decree- see *Ecobank Kenya Ltd V. True North Construction Company Limited & Another* (2018)eKLR.

50. The Applicant has given a detailed account as to why they resulted to these Garnishee proceedings. That the Judgment Debtors had embarked on satisfying the decree by issuing cheques through their own advocates (see the letter availed as annexure “B” by Applicant). All the five cheques availed as annexure C bear the name of Kuza Farm & Allied Ltd. The letter marked as annexure “F” is from the Decree Holder’s advocate informing the auctioneers that no payments were made from the forwarded cheques due to insufficient funds. In that regard the Decree Holder contends that the Judgment Debtors have a symbiotic-siamese relationship with the 2nd Garnishee whereby the 1st Judgment Debtor is the controlling and majority shareholder of the 2nd & 3rd Judgment Debtors and 2nd Garnishee.

51. The above arguments have robustly been opposed by the 1st Garnishee, the Judgment Debtors have made a puny show, while the case for 2nd Garnishee is a no show.

52. It is not fathomable that the 1st Garnishee is fighting tooth and nail to halt any payments by the 2nd Garnishee to the Decree Holder. As pointed out by the Decree Holder, the 1st Garnishee seems to be holding brief for and defending the 2nd Garnishee. To this end, the 1st Garnishee has even advanced an argument that no monies are held or due to the 2nd Garnishee from the 1st Garnishee since the



conditions that were set out in the consent in Petition Case ELC. No. 507 of 2014 have not been met. In regard to the arguments advanced by the 1st Garnishee as to why the 2nd garnishee should not be subjected to these garnishee proceedings, I find that it is not the place of this court to delve into an analysis of the implementation of the consent in ELC Pet 507 of 2014. It is also not the place of the 1st Garnishee to play a holding brief role in the affairs of the 2nd Garnishee, the Judgment Debtors and the Decree Holder. After all, the Judgment Debtors and the 2nd Garnishee have legal representation. Again once the payments in ELC PET.507 of 2014 are made to the 2nd Garnishee, such monies would not belong to the 1st Garnishee anymore. In that regard, the arguments of the 1st Garnishee as to why the 2nd Garnishee is not liable to satisfy the decree are not tenable.

53. It is noted that in paragraph 13 of the Replying Affidavit of Robert Ayusi, the 1st Garnishee does identify the 1st Judgment Debtor as a director (or shareholder) of the 2nd Garnishee, but their argument is that these are two separate entities. I have however already made a pronouncement that it is not the business of the 1st Garnishee to hold any brief for the 2nd Garnishee.
54. The above notwithstanding, this court still has to make a determination as to whether a Garnishee order can be confirmed as against the 2nd Garnishee based on the arguments presented by the Applicant and the Judgment Debtor. To this end, the court will delve into the issue as to whether the corporate veil of the 2nd Garnishee can be lifted.
55. The arguments presented by the Judgment Debtors in their grounds of opposition are that the company (read 2nd Garnishee) is distinct and separate personality from its share holders and that the Judgment Debtors are not owed any monies by the 2nd Garnishee. In their submissions, they contend that directors of 3rd Judgment Debtors are Swift Distributors Limited and Home Decor Limited. They further claim that the 2nd Judgment Debtor owns a parcel of land L.R. No. 12979/3 (presumably, this is a property which can be attached).
56. It is the finding of this court that the Judgment Debtors cannot purport to adduce evidence in the submission platform. Such factual averments ought to have been set out in a solemn affirmation to enable the opposite party to give a rebuttal where necessary. It is noted that a Replying Affidavit is the principal document wherein a Respondent's reply is anchored upon and the basis of any submissions and/or List of Authorities as was held in the Supreme Court of Kenya case of *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR. Presumably out of choice, the Judgment Debtors opted to file no affidavits in this matter.
57. The Applicant has given a spirited account as to why the corporate veil of the 2nd Garnishee should be lifted arguing that the organic theory of companies should be applied in the instant case. In the Court of Appeal case of *Stephen Njoroge Gikera & Another v Econite Mining Company Limited & 7 others* [2018] eKLR, it was stated that:

“This was therefore essentially and as it emerged before the trial court; a case of Mr. Gikera wearing a different hat to avoid legal obligations that came with his directorship of the 1st respondent, while hiding under the veil of incorporation. Unfortunately the veil could not cover him entirely because a bigger portion of the veil happened to be worn by himself just as the old adage goes “you cannot have your cake and eat it”. It is precisely this kind of situation that the principle of lifting the corporate veil seeks to obviate. The corporate persona of a company will be dispensed with in cases where it is apparent that the company is being used as ‘A creature of [the controlling director], a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity.’”



...

58. Similarly, the Court of Appeal in *Zingo Investment Limited v Miema Enterprises Limited* [2015] eKLR stated thus:

“The extent to which a court can pierce a corporate veil is discussed at Paragraph 90 of *Halsbury’s Laws of England 4th Edition* (*supra*) that:

90. Piercing the corporate veil.

Notwithstanding the effect of a company’s incorporation, in some cases the court will ‘pierce the corporate veil’ in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company. This will be done not only where there is fraud or improper conduct but in all cases where the character of the company, or the nature of the persons who control it, is a relevant feature. In such case, the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders, and will consider who are the persons, as shareholders or even as agents, directing and controlling the activities of the company. (emphasis own)”

59. The above case law resonates well with the authorities proffered by the Applicant in its quest to have the corporate veil of the 2nd Garnishee lifted.
60. The court records indicate that there was a consent recorded in this court on December 15, 2015 in which the Judgment Debtors undertook to pay to the Decree Holder a sum of Ksh. 4 Million on or before December 18, 2015 as part payment of the decretal sums. In that regard, the advocates for the Judgment Debtors (Wagara Koyyoko & Co. Advocates) wrote to Decree Holders advocates a letter dated December 4, 2015 enclosing the five cheques of Ksh.4 million. These happens to be the cheques which were drawn in the name of the 2nd Garnishee. Neither the Judgment Debtors, nor the 2nd Garnishee have given a plausible explanation as to why the purported funds were to be paid by the 2nd Garnishee.
61. It is however the letter of September 9, 2016 written by Wagara Koyyoko & Co , advocates to Mutembei , Gichuru & Co.Advocates which laid bare the symbiotic-Siamese relationship that the Decree Holder keeps hammering on. At this juncture, I find it expedient to extract the contents of the said letter.

“Re: HCCC ELC. No. 932 of 2013

Emris Investments Limited v Cyrus Shakhhalaga Khwa Jirongo & 2 Others

We refer to the above matter and the telecommunication between the undersigned and your Mr. Mutembei.

We forward herewith a copy of decree obtained by our client in HCCC. No. 507 of 2014. We act for the Plaintiff in that matter whose Managing Director is the 1st Defendant herein.

We Intimated to you and hereby confirm that we have been instructed by our client that in consideration of you and your clients agreeing not to proceed with execution levied yesterday in this matter, we hereby undertake to you that we shall pay to you the sum of Kshs. 18,000,000/= (Kenya Shillings Eighteen Million) out of the proceeds of the decretal amount in HCCC No. 507 of 2014 aforesaid.



We are further instructed that our client is in the process of sub-dividing L.R. No. 12979/3 (The Ruai property) with a view to selling a portion of 110 acres thereof for purposes of settling bank liabilities and paying of outstanding creditors including your clients.

We are thus instructed to undertake to you that subject to receipt by us of the sale proceeds of the pending sale we shall pay to you the balance of the decretal amount herein being the sum of approximately Kshs. 12,000,000/=.

Our client has previously made payment of Kshs.2,000,000/= towards the decretal amount and over Kshs. 1,600,000 auctioneer's charges.”

62. The Plaintiff in the case referred to (Pet. No. 507 of 2014) is the current 2nd Garnishee. The Judgment debtors are the ones offering information that 1st Judgment Debtor is the managing director of the 2nd Garnishee. Neither the Judgment Debtors nor the 2nd Garnishee have challenged the said letter. I therefore find that there is no rocket science needed in discerning that the 1st Judgment Debtor is the controlling mind of the 2nd Garnishee. Thus this is a proper case to lift the corporate veil of the 2nd Garnishee.
63. The court takes cognizance of the fact that from the time the Garnishee *Nisi* order was given on December 2, 2016, the 2nd Garnishee has never challenged the said order despite having two advocates appearing for them (see proceedings of October 7, 2021). In terms of the provisions of Order 23 Rule 4 of the Civil Procedure Rules, I find that the 2nd Garnishee is not opposing the application.

Disposal orders

64. In the end, I find that the application dated November 21, 2016 as well as the Preliminary Objection dated April 24, 2018 are partially successful. I grant the following orders:
 1. The 1st Garnishee shall not be subjected to any Garnishee proceedings and the Garnishee *Nisi* Order issued on 2.12.2016 (as against 1st garnishee) is hereby discharged.
 2. The sums that shall be paid to the 2nd Garnishee emanating from the judgment in ELC Petition No. 507 of 2014 are to be attached to satisfy the decree herein plus costs and interest; Thus the garnishee *nisi* order issued on December 2, 2016 by this court is hereby confirmed as against the 2nd Garnishee.
 3. The Judgment Debtors are condemned to pay the costs of this application.
 4. No orders as to costs in respect of the Preliminary Objection dated April 24, 2018.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF JULY 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Mutembei for Decree Holder

Wanjiku holding brief for Koyyoko for Judgment Debtors

Omamo holding brief for Mr. Opore for 1st Garnishee

Court Assistant: Joan

